No. 81-79

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IN THE

Supreme Court of the United States

October Term, 1981

IN RE STATE OF MISSOURI, et al.,

Petitioners,

—v.—

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS and the HONORABLE CHARLES W. BAKER, et al.,

Respondents.

PETITIONERS' SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This brief calls attention to new cases decided after petitioners' last brief was filed on September 14, 1981.* In *State of Ohio* v. *Mansfield Tire and Rubber Company*, ____ F.2d ____ (6th Cir. 1981), Slip Op. 81-3101, 3 Bankr. L. Rep. (CCH) ¶ 68,356, p. 79,785, September 29, 1981, the Sixth Circuit joined the Second and Fifth** in holding that bankruptcy courts do not have subject matter jurisdiction to bar governmental units—in that case, the State of Ohio and certain of its

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* This brief is filed pursuant to this Court's Rule 22.6.

** The decisions of the Second and Fifth Circuits are discussed in petitioners' supplemental brief dated August 12, 1981, pp. 3-4.

agencies—from enforcing or administering their police and regulatory power, particularly where no significant property interest of the debtor's estate would be affected.*

Unlike the Eighth Circuit's decision in the present case, the Sixth Circuit in *State of Ohio* refused to *imply* that the debtor's estate had any ownership interest in property as a basis for bankruptcy court jurisdiction and ruled that bankruptcy courts lack jurisdiction to bar governmental enforcement proceedings that would not in reality injure or interfere with any property of the debtor's estate.** Contrariwise, the rule of the Eighth Circuit would in substance establish *phantom* ownership interests for the debtor's estate in property of *others* that serve to trigger "preliminary jurisdiction" sufficient for a bankruptcy court to bar enforcement proceedings by duly constituted governmental agencies, despite the absence of any language in the Bankruptcy Code or its Congressional history to support its unprecedented analysis.

Just as there was no interference with any property of the debtor's estate in *State of Ohio, supra,* in the present case no property of the debtors' estates would be interfered with by petitioners' enforcement actions if the bankruptcy court were held to lack jurisdiction. In its decision, the Eighth Circuit specifically acknowledged that the debtors' interest in the grain was "minute" and that the trustee had "presented no documents of title to substantiate his claim of ownership." *In re State of Missouri* v. *U.S. Bankruptcy Court,* 647 F.2d 768, 774 (8th Cir. 1981). While petitioners' enforcement proceedings thus could not interfere with any property of the debtors'

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* The Sixth Circuit specifically ruled that a bankruptcy court lacked jurisdiction to pass on workers' claims for injury and that such jurisdiction was vested exclusively in the applicable state agency and state courts. 3 Bankr. L. Rep. at p. 79,790.

** In *State of Ohio, supra,* the State's exercise of jurisdiction did not interfere with any property of the debtor's estate because the debtor's estate would not be obligated to pay any workers' claims that might be sustained; such claims would by law be subject to satisfaction out of an available statutory insurance fund.

estates, the Eighth Circuit, contrary to the Sixth Circuit's analysis, nevertheless ruled that the bankruptcy court had jurisdiction to bar or regulate Missouri's enforcement proceedings.

The underpinning of the decision below was the Eighth Circuit's unprecedented and unexplained principle of "preliminary jurisdiction", a term not previously used in the law of subject matter jurisdiction. Neither that phrase nor its concept finds any roots in the 1978 bankruptcy legislation, the Bankruptcy Act of 1898, Congressional history or case law. Yet, based on that new phrase, phantom interests of the debtors in bailed grain concededly not owned by these estates were held below to be sufficient to trigger preliminary jurisdiction in the bankruptcy court over a vast quantity of grain never owned by the debtors. 647 F.2d at 774. The Eighth Circuit thus departed from the traditional approach to the issue of bankruptcy court control over governmental enforcement actions exemplified by the Sixth Circuit's very recent decision in *State of Ohio.**

The Court in *State of Ohio* rejected the further contention that, although the *enactment* of workers' compensation laws concededly constituted a valid exercise of a state's police power, the *administration* of such laws did not. The Sixth Circuit thus held that where, as here, the police power supports enactment of a law,** governmental action to implement that law also constitutes "an exercise or extension of the police powers." 3 Bankr. L. Rep. at p. 79,790.

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* The trustee's disingenuous ownership claim was paralleled by his unproven claim for storage charges. Although petitioners had determined that storage charges for the grain deposited with the debtors had been prepaid by the depositors to a date subsequent to the appointment of the bankruptcy trustee in these cases, Pet. A-51, the Eighth Circuit seemed to accord some credence to the trustee's storage charge claim even though, as in the case of the trustee's ownership claim, no documentary or other evidence had ever been presented by the trustee to establish his storage charge claim. 647 F.2d at 774.

** See e.g., *Munn* v. *People of Illinois*, 94 U.S. 113 (1877) as to grain laws. The Eighth Circuit itself acknowledged that grain laws are "regulatory in nature." 647 F.2d at 776.

No real question exists as to the police power status of state grain laws. Nor is there any genuine issue as to whether petitioners' enforcement of their grain laws constituted the enforcement of police or regulatory power. Both courts below even acknowledged that petitioners' efforts were undertaken in good faith. 647 F.2d at 779.

Rather, the Eighth Circuit withheld the immunity traditionally accorded to police power enforcement activities for the reason that it perceived grain laws "primarily [to] relate to the protection of the *pecuniary* interest in the debtors' property and not to matters of public safety and health." (Italics added). 647 F.2d at 776. However, no authority supports that proposition. Many governmental enforcement actions are designed to protect pecuniary rights; the Eighth Circuit's rule would eliminate immunity from bankruptcy court jurisdiction traditionally conferred by Congress in many instances. As noted in *State of Ohio*, the very thrust of which was protection of the pecuniary rights of injured workers, Congress did not, either by the Bankruptcy Act of 1898 or the Bankruptcy Code of 1978, confer jurisdiction on the bankruptcy courts to supersede state tribunals with respect to workers' claims.* Any doubt as to whether pecuniary interests fall outside the scope of the police power is removed by *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25 (1952) where this Court stated that the National Labor Relations Board was the public agent of Congress chosen to enforce back pay awards designed "to vindicate the public policy of the statute." 344 U.S. at 27. The enforcement of clearly pecuniary rights in that case did not

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* Early case law withheld jurisdiction from the courts of bankruptcy to bar enforcement proceedings by state agencies. See e.g., *In re Bay Ridge Inn, Inc.*, 94 F.2d 555, 557 (2d Cir. 1938) (per Hon. A. N. Hand); *Colonial Tavern, Inc.* v. *Byrne*, 420 F.Supp. 44, 45-46 (D. Mass. 1976) where the court, rejecting the argument of debtor's counsel (Professor Vern Countryman of Harvard Law School) stated that governmental immunity was essential to prevent bankruptcy relief from providing an "instantly available, cheap and easy sanctuary from all state regulatory enforcement proceedings."

remove governmental activity to enforce such pecuniary awards from the area of public policy.

The Eighth Circuit's decision in *State of Missouri* and the Sixth Circuit's in *State of Ohio* proceed from fundamentally different starting points. They employed disparate analyses despite the fact that each relied on exactly the same Congressional history and cited substantially the same case law. See *State of Missouri, supra,* 647 F.2d at 775, and *State of Ohio, supra,* 3 Bankr. L. Rep. at pp. 79,789-90.

The Eighth Circuit's analysis creating a phantom property interest for the estate, also conflicts with the approach of the Seventh Circuit in its very recent decision in *Gorenz* v. *State of Illinois Department of Agriculture,* 653 F.2d 1179 (7th Cir. 1981). There, the Court held that a bankruptcy court lacked summary jurisdiction under the former Bankruptcy Act over a claim by a trustee to compel the Illinois Department of Agriculture to turn over the proceeds of the sale of grain. The Seventh Circuit stated that jurisdiction could not "be made to rest solely upon such flimsy documentation" that had been presented by the trustee. 653 F.2d at 1185. Jurisdiction should have been withheld in the present case as well in view of the Eighth Circuit's recognition that "no documents of title to substantiate his claim of ownership" had ever been presented by the trustee. 647 F.2d at 774.

The phantom ownership doctrine announced in the present case is in conflict with the traditional rule under which trustees must establish the debtor estate's ownership by clear and convincing evidence, as required by the Seventh Circuit in *State of Illinois, supra.* In the present case, the amorphous ownership concept applied by the Eighth Circuit was unsupported by any documents and without foundation in any statutory or case law or Congressional history. Review by this Court is thus important to resolve whether bankruptcy courts have jurisdiction to bar enforcement proceedings by governmental units based on a mere *assumption* that the debtor estate has some sort of property interest that would be affected by

governmental enforcement activities, in the absence of proof of a real ownership interest.

Unsubstantiated ownership claims by bankruptcy trustees should not be sanctioned or encouraged. They spawn protracted and costly litigation against governmental units. They delay the distribution to the rightful owners of property not owned by the debtor estate. In these days of governmental austerity and severe budgetary constraints, governmental units should not be forced to maintain costly litigation in order to establish the traditional immunity from bankruptcy court jurisdiction of their activities to enforce their police and regulatory power.

CONCLUSION

For the reasons set forth above, and in their petition, first supplemental brief and reply brief, petitioners respectfully request that this Court issue a writ of certiorari and reverse the Eighth Circuit's judgment.

Respectfully submitted,

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